



FEDERAL ELECTION COMMISSION  
WASHINGTON, DC 20463

August 13, 1992

Jan Witold Baran, Esquire  
Wiley, Rein & Fielding  
1776 K Street, NW  
Washington, DC 20006

RE: MUR 2314  
National Republican  
Senatorial Committee  
James L. Hagen, as  
treasurer

Dear Mr. Baran:

This Office has received your letter of June 17, 1992, in which you request that the Commission either take no further action in the above-cited matter or vacate its findings of probable cause to believe and reinstate the briefing procedures provided by the Federal Election Campaign Act and the Commission's regulations. In response we are enclosing a Supplemental Brief which addresses the issues in MUR 2314 in light of the decision of the Court of Appeals for the District of Columbia in Federal Election Commission v. National Republican Senatorial Committee, No. 91-5176, (D.C. Cir. June 12, 1992), and which recommends that the Commission neither take no further action nor vacate its probable cause to believe determinations in the present matter.

Within fifteen days of your receipt of this letter and supplemental brief you may file with the Secretary of the Commission a responsive supplemental brief stating your position on the issues. The General Counsel's Supplemental Brief and any response which you may submit will be considered by the Commission before any decisions are made with regard to your most recent requests.

If you have any questions, please contact Anne A. Weissenborn, the attorney assigned to this matter, at (202) 219-3400.

Sincerely,

Lawrence M. Noble  
General Counsel

Enclosure  
Supplemental Brief

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
 )  
 ) MUR 2314  
National Republican Senatorial )  
Committee )  
James L. Hagen, as treasurer )

GENERAL COUNSEL'S SUPPLEMENTAL BRIEF

I. BACKGROUND

On March 10, 1992, the Commission found probable cause to believe that the National Republican Senatorial Committee ("the NRSC") and James L. Hagen, as treasurer, had violated 2 U.S.C. § 434(b) and 11 C.F.R. § 110.6(d)(2) by failing to report as contributions from itself \$71,627.33 in earmarked contributions transmitted to Jim Santini for Senate through the NRSC's 1986 Direct-To operation, and by failing to report as contributions from the NRSC \$32,575 in earmarked contributions transmitted to Jim Santini for Senate by means of NRSC checks through the committee's Majority '86 operation. The Commission also found probable cause to believe that the NRSC and James L. Hagen, as treasurer, had violated 2 U.S.C. § 434(b) and 11 C.F.R. § 106.1 by failing to report as contributions to Jim Santini for Senate unreimbursed costs related to unsuccessful solicitations for the portion of the NRSC's 1986 Direct-To Auto program which solicited contributions to the Santini campaign, and solicitation costs for the Direct-To and Majority '86 programs related to contributions which were successfully redesignated to the Santini campaign, but not including the unsuccessful costs of general party fundraising

in programs where the contributors were called back. Further, the Commission found probable cause to believe that the NRSC and Jim Hagen, as treasurer, violated 2 U.S.C. § 441a(h) with respect to the above unreported contributions.

Following the Commission's approval of a proposed conciliation agreement on April 28, 1992, this Office notified counsel of the Commission's determinations by letter dated May 5, 1992. On June 18, 1992, this Office received from counsel a letter citing the recent decision of the United States Court of Appeals for the District of Columbia Circuit in Federal Election Commission v. National Republican Senatorial Committee, No. 91-5176, (D.C. Cir. June 12, 1992) ("FEC v. NRSC") and asking that the Commission either take no further action in MUR 2314 or vacate its probable cause to believe determinations and reinstate the briefing requirements at 11 C.F.R. § 111.16. The following is a supplemental brief which recommends that the Commission neither take no further action nor vacate its probable cause findings.

## II. ANALYSIS

### A. Decision of Court of Appeals

In FEC v. NRSC (Attachment 2) the court of appeals reversed the decision of the United States District Court for the District of Columbia in Federal Election Commission v. National Republican Senatorial Committee, 761 F. Supp. 813 (D.D.C. 1991) ("NRSC"). The district court had found that in 1986 the NRSC exercised direction or control over the choice of the ultimate recipients of certain earmarked contributions for which the NRSC had acted as

conduit, and thus violated the Act by failing to report these contributions as coming from itself as well as from the initial contributors, as required by 2 U.S.C. § 434(b) and 11 C.F.R. § 110.6(d), and by exceeding its contribution limitation at 2 U.S.C. § 441a(h). The court of appeals based its decision upon the fact that the Commission had initially failed by a vote of 3-3 to find probable cause to believe that the NRSC had violated 2 U.S.C. § 434(b) and 441a(h) with regard to the conduit program at issue; this court found that the statement of reasons of the Commissioners who had opposed probable cause to believe determinations "provided a reasoned justification for not proceeding" and represented the official Commission construction of 11 C.F.R. § 110.6(d).

Counsel for the NRSC in MUR 2314 argues that the General Counsel's Brief in this matter relied upon the district court's ruling in NRSC as to factors which would constitute "direction or control." Counsel asserts that the court of appeals "abrogated two factors" which had been "invoked" in the Brief and "implicitly rejected the General Counsel's 'totality of circumstances' approach which focused on these two factors." The two factors to which counsel refers were the form of the checks used to make contributions (i.e., they were made payable to the NRSC) and the "suggestion" of specific candidates. Further, counsel finds in the court of appeals' decision an emphasis upon "coercion" as important to a finding of "direction or control." Finally, counsel points to the court of appeals' concern about the Commission's "lack of precision" in defining "direction or

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control." It is counsel's position that the ruling of the court of appeals "undermines the Commission's finding of probable cause in MUR 2314" and requires a justification other than the one provided in the General Counsel's Brief.

In responding to counsel's arguments it is important to be clear as to the fact pattern before the court of appeals in FEC v. NRSC, as to the facts upon which the Commission based its probable cause determinations in MUR 2314, and as to what the appeals court actually stated in applying the law and Commission precedent to the fact pattern before it. There are significant differences between the conduit program at issue in FEC v. NRSC and the particular conduit operations still at issue in MUR 2314, differences which center around the call-back component present in the latter but absent from the former. In addition, this Office disagrees with counsel's interpretation of the appeals court decision, including its applicability to the present matter.

B. Solicitation Programs

a. FEC v. NRSC

The 1986 conduit program addressed in FEC v. NRSC was the Direct-To Auto operation which involved a series of direct mail solicitations for contributions to be divided among, and sent on to, Republican candidates for the U.S. Senate. Each solicitation letter listed four states where the race for the Senate was deemed close, suggested an amount which would be divided equally by the NRSC among the campaigns in the four cited states, and instructed the contributor to make his or her check payable either to the NRSC or to a fund controlled by that committee. The resulting

contributions were received by the NRSC, placed in an NRSC account, and then distributed among the candidate committees.

As stated above, the Commission initially voted 3-3 on whether the NRSC had violated the Act by failing to report the contributions sent on under this program as coming from itself and by exceeding its contribution limitation. Thus, the Commission, in the first phase of the enforcement process, did not find that this program resulted in NRSC direction or control over the choice of the recipients of the contributions. The court of appeals has ruled that the bases given by the dissenters in their statement of reasons for not finding direction or control were reasonable, the bases being that the deposit of the contributions into an NRSC account was permissible and that NRSC's pre-selection of candidates for whom contributions would be solicited did not constitute control.

2. MUR 2314

a. Direct-To

The first of the two 1986 NRSC conduit operations involved in the Commission's probable cause determination in MUR 2314, and discussed in the proposed conciliation agreement sent to the NRSC, is the Direct-To program. As was spelled out in detail in the General Counsel's Brief, the Direct-To program consisted of the solicitation of contributions to the NRSC which were placed in a special segregated NRSC account. After their receipt and deposit, representatives of the NRSC called the contributors and suggested that they designate some or all of their individual contributions to specific federal candidates named by the NRSC representative.

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One of these candidates was James Santini. The contributor could direct his or her contribution to one, all or none of the candidates suggested by the NRSC caller, or to a candidate not identified by that representative; however, the script used by the callers did not include any specific language to inform the contributor that he or she did not have to earmark the contribution. Nor was the option of giving to a candidate not suggested by the caller expressly provided. Once a contributor agreed to designate some or all of his or her contribution to a specific candidate, the NRSC sent a candidate support verification form to the contributor which identified the candidate to receive the contribution. The contributor was asked to sign and return the form to the NRSC. In the case of contributions being earmarked for the Santini campaign, the contributor's signature was included above a statement verifying the contributor's telephone "instruction" that a particular amount was to be "utilized in direct support of Jim Santini of Nevada . . . and will be forwarded to that campaign on my behalf."

The General Counsel's Brief addressed, inter alia, the issue of whether the NRSC exercised direction or control over the \$71,627.33 in earmarked contributions sent on to the Santini campaign through the Direct-To program. The Brief examined the NRSC's involvement in the timing of the distribution of contributions collected through the Direct-To program and cited the fact that checks were made out to the NRSC, but it also stressed at length the passive role taken by the contributors with

regard to the forwarding of the contributions to particular candidates.

In the Direct-To operation, the contributors had earlier made contributions which were already in an NRSC account before the contributors had an opportunity to decide whether to earmark their contributions. The checks were already in the NRSC account and all the contributors did was consent to how the NRSC wanted to spend their contributions. The contributors did not make the decision to contribute to a particular candidate, they merely consented to the NRSC's suggestion that they do so. (General Counsel's Brief, page 17.)

The Brief went on to compare this particular solicitation program with that involved in Advisory Opinion 1975-10 in which the Commission decided that a conduit would assert control over the earmarking of contributions if it actively sought to obtain consent from contributors to the earmarking of previously received contributions for a specific candidate.

As can be seen from the description of the Direct-To program in MUR 2314, it differed considerably from the program addressed by the court of appeals in FEC v. NRSC, most importantly because it involved the receipt of contributions intended for the NRSC itself and subsequent call-backs of the contributors by NRSC representatives who cited particular candidates for whom the contributors might want to earmark their already-made contributions. Thus, while the General Counsel's Brief discussed the district court's decision in NRSC, this decision was not viewed as controlling with regard to the Direct-To operation because of the added element of call-back in the latter.



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The General Counsel recommended that the Commission find probable cause to believe that the NRSC had exercised direction or control over the \$71,627.33 in contributions sent to the Santini campaign through the Direct-To program. Unlike in the earlier matter before the court of appeals, the Commission voted 5-0 to find probable cause to believe the NRSC violated the Act by failing to report these contributions as coming from itself and by exceeding its \$17,500 contribution limitation at 2 U.S.C. § 441a(h), determinations which were based upon the NRSC's evident direction or control of the earmarked contributions involved.

b. Majority '86

The NRSC's Majority '86 operation also involved in part a call-back procedure. As was stated in the General Counsel's Brief, one of the ways in which funds were raised for this program was by depositing contributions to the NRSC's "Inner Circle" into the Majority '86 account. (The Inner Circle was the designation given contributors of \$1,000 to the NRSC.) NRSC telephone callers then contacted the contributors for "instructions" on earmarking their previously unearmarked contributions to specific Senate candidates. Of the \$75,575 sent to the Santini Committee by the NRSC through the Majority '86 program, \$32,575 was transmitted in the form of checks drawn on an NRSC account. The acknowledged mechanism of telephone callbacks and other personal contacts to solicit earmarking, plus the use of the NRSC account, provides strong evidence that the NRSC exercised direction or control over the choice of the recipients of the \$32,575 in originally unearmarked contributions.

Thus, this Office recommended that the Commission find probable cause to believe that the NRSC exercised direction or control over these contributions. The Commission voted 5-0 to find probable cause to believe that the NRSC failed to report these particular contributions as coming from itself and also exceeded its contribution limitation.

Again, the part of the Majority '86 program involved in the Commission's probable cause determinations differed from the program at issue in FEC v. NRSC by virtue of the facts that the contributions involved were initially received as contributions to the NRSC, not as contributions earmarked for candidates, and that they were later earmarked to specific candidates as the result of telephone calls or other personal contacts purposely made by NRSC representatives to obtain such designations from the contributors.

C. Interpretations of FEC v. NRSC and of the General Counsel's Brief

Counsel for the NRSC argues in the present matter that the court of appeals in FEC v. NRSC "abrogated" two factors which the General Counsel's Brief cited as bases for its recommendations in MUR 2314 that the Commission find probable cause to believe, namely the fact that the checks used to make the initial contributions were made payable to the NRSC and deposited into an NRSC account, and the fact that the NRSC "suggested" specific candidates to the potential contributors. These were the facts cited in the statement of reasons issued by the dissenters in the earlier matter as not being sufficient bases for a finding of probable cause to believe.

It is not, however, clear that the court of appeals determined that these factors could never constitute evidence of direction or control. Rather, the court stated,

To find direction or control on these facts would require a substantial shift in the Commission's construction of the language contained in § 110.6(d)(2). To do so on the basis of the two factors discussed above would threaten to vitiate § 110.6(c), which specifies the procedures for handling and reporting earmarked contributions, and would throw into doubt whether any solicitation of any earmarked contribution would be exempt from the 'double-counting' requirement of § 110.6(d)(2). This case does not require us to decide if that would be a permissible construction of the regulation in light of its terms, the statute, or the Constitution. It is enough to say that the Commission has not affirmatively adopted such a construction and that it has provided, through the statement of Commissioner Josefiak, joined by two others, a reasoned justification for not doing so. It was error for the district court to force a different construction upon the Commission and the entities subject to its regulation.

Regardless of whether the court of appeals found conclusively that having a conduit as the payee on contribution checks, or having a conduit pre-select specific recipients, would not be evidence of "direction or control," the General Counsel's Brief in the present matter did not base its recommendations solely upon these factors. Rather, it stressed at length the additional procedure in the Direct-To operation and, in part, in the Majority '86 program of telephoning contributors of previously unearmarked contributions in order to secure their agreement to send their contributions to particular candidates suggested by the caller. The fact of this procedure is also stressed in the proposed conciliation agreement, making it clear that this element was

viewed as crucial to the Commission's finding of direction or control in the present matter.

Secondly, counsel argues that the court of appeals "emphasized the importance of actual coercion to a finding of 'direction or control'," and that the General Counsel's Brief "concedes that contributors 'consented' to earmark their contributions without any evidence of coercion." In fact, neither the court of appeals' opinion nor the General Counsel's Brief uses the term "coercion." Rather, the court's discussion on the pages cited by counsel addresses only the "pre-selection" of candidates in solicitations and the decision by potential contributors not to contribute at all, while the section of the General Counsel's Brief cited by counsel discusses the fact that the contributed funds at issue were already in the NRSC's account and that their contributors gave their consent to the NRSC's suggestions as to which candidates they should be sent.

Thirdly, counsel states that "the Court of Appeals expressed concern over the [Commission's] stark 'lack of precision' in defining 'direction or control,' especially in light of the recognized First Amendment associational interests implicated." This "concern," however, was not the basis for the court's decision. Nor does it prevent the Commission from making an affirmative determination that a certain set of actions do constitute "direction or control."

Further, it must be emphasized that the appeals court in FEC v. NRSC was confronted by a Commission evenly divided over the issue of whether the facts in that case constituted direction or

control. A like situation is not present in MUR 2314. Here the Commission voted 5-0 to find that violations had resulted because it found direction or control by the NRSC of the contributions raised through the specific programs still at issue. Thus, the court of appeals decision in FEC v. NRSC was rendered in context of agency votes quite different from those in the present matter. In reaching its decision, the appeals court relied upon the reasoning of the three Commissioners who were dissenters to a finding of probable cause to believe. In the present matter there were no dissenters.

C. Request for No Further Action

Counsel's request that the Commission take no further action in the present matter and close the file is based upon two assumptions, the first being that the court's decision in FEC v. NRSC resolves the issue of "direction or control" as to the facts presented in this matter, and the second that the only basis for the Commission's probable cause determinations is the NRSC's relationship to the contributions made through the Direct-To and Majority '86 operations. The first of these assumptions has been discussed and disproved above. The second is inaccurate.

The Commission's determinations that there is probable cause to believe that the NRSC violated 2 U.S.C. §§ 434(b) and 441a(h), and 11 C.F.R. §§ 106.1 and 110.6(d) involved both contributions for which the NRSC acted as conduit and the expenditures made by the NRSC to solicit these contributions. The Commission has found that the committee did not allocate to Jim Santini for Senate a total of \$79,453.05 in solicitation costs in violation of 2 U.S.C.

§ 434(b) and 11 C.F.R. § 106.1. Thus, there remains grounds for both the probable cause determinations and conciliation over and above the issue of the conduited contributions themselves.

**III. RECOMMENDATIONS**

1. Deny Respondents' request that the Commission take no further action in this matter.
2. Deny Respondents' requests that the Commission vacate its probable cause determinations in this matter.

Date

8/13/92

  
Lawrence M. Noble  
General Counsel

Staff Assigned: Anne Weissenborn